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R.A., Appellant)	
)	
and)	Docket No. 16-0467
)	Issued: May 23, 2016
U.S. POSTAL SERVICE, POST OFFICE,)	
Bell, CA, Employer)	
)	

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 13, 2016 appellant, through counsel, filed a timely appeal from a September 30, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,143.53; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 23, 1992 appellant, then a 33-year-old mail equipment handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury on September 22, 1992 when he was hit in his right leg by a forklift at work. OWCP accepted that he sustained a right knee sprain, right leg contusion, and lumbar sprain. Appellant received disability compensation on the daily roll beginning April 14, 2009. He received disability on the periodic rolls beginning June 7, 2009.²

The record contains a form, signed on April 22, 2014, in which appellant elected to receive retirement benefits from the Office of Personnel Management (OPM), under the Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS), instead of FECA benefits. On the form, appellant certified that he understood that he was not entitled to receive FECA benefits and CSRS/FERS benefits concurrently (except for a schedule award).

In a July 17, 2014 notice, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$3,143.53 because he received a prohibited dual payment of FECA disability compensation and retirement benefits from OPM for the period May 1 to 31, 2014. It also made a preliminary determination that he was at fault in the creation of the overpayment because he knew or should have known that he could not receive such dual benefits. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed him that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return the enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

Appellant requested a telephone prerecoupment hearing with an OWCP hearing representative on the issues of fact, amount, and fault.³ During the hearing held on March 24, 2015, counsel argued that it was not clear from the record whether appellant actually received retirement benefits from OPM for the period May 1 to 31, 2014.

By decision dated June 15, 2015, an OWCP hearing representative determined that the case should be remanded to OWCP to determine whether appellant received retirement benefits from OPM for the period of the claimed overpayment, May 1 to 31, 2014. He found that the case record did not contain clear evidence regarding the period appellant had received retirement benefits from OPM and determined that, on remand, OWCP should attempt to obtain such evidence.

On remand, OWCP requested that OPM indicate when appellant began receiving retirement benefits from OPM. The memorandum of a September 22, 2015 telephone

² In late 2010, appellant filed two occupational disease claims (Forms CA-2) under separate file numbers for a skin disorder and for carpal tunnel syndrome. Neither claim was accepted by OWCP.

³ Appellant asserted that he timely notified OWCP of his receipt of retirement benefits from OPM.

conversation indicated that an OPM official reported that on June 10, 2014 he received retirement benefits from OPM for the period May 1 to 31, 2014. In a letter dated September 28, 2015, an OPM official advised OWCP that appellant received retirement benefits from OPM beginning May 1, 2014 and continuing.⁴

In a September 30, 2015 decision, OWCP determined that appellant had received an overpayment of compensation in the amount of \$3,143.53. It found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP determined that appellant knew or should have known that he could not receive the dual benefits that created the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁶ Section 8116(a) provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁷ Section 10.421(a) of OWCP's implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁸ The beneficiary must elect the benefit that he or she wishes to receive.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,143.53.

The record contains documents showing that appellant elected OPM retirement benefits beginning effective May 1, 2014. As noted above, FECA and OWCP regulations provide that a

⁴ The evidence of record reveals that appellant received FECA disability compensation for the period May 1 to 31, 2014 in the amount of \$3,143.53.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ *Id.* at § 8116(a).

⁸ 20 C.F.R. § 10.421(a).

⁹ *Id.*

beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.¹⁰

As appellant elected retirement benefits from OPM for a period already covered by FECA compensation payments, the Board finds that he did in fact receive an overpayment of compensation for the entire amount. His election of retirement annuity benefits from OPM, beginning May 1, 2014 and continuing through May 31, 2014, created a prohibited dual benefit under section 8116 of FECA. The record supports that appellant received wage-loss compensation in the amount of \$3,143.53 for the period May 1 to 31, 2014. The Board, therefore, affirms OWCP's September 30, 2015 decision on the issue of fact and amount of overpayment.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹² The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹³ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹⁴

In determining whether an individual is not "without fault" or alternatively "at fault" in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment --

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

¹⁰ See *supra* notes 7 and 8.

¹¹ 5 U.S.C. § 8116; see *N.P.*, Docket No. 15-1799 (issued January 11, 2016).

¹² *Id.* at § 8129(a).

¹³ *Id.* at § 8129(b).

¹⁴ *L.J.*, 59 ECAB 264 (2007).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”¹⁵

Section 10.433(b) of OWCP’s regulations provides:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation under the third prong of 20 C.F.R. § 10.433(a)¹⁷ and that, therefore, the overpayment was not subject to waiver.

On April 22, 2014 appellant signed a form in which he elected to receive retirement benefits from OPM instead of FECA disability compensation. On the form, appellant certified that he understood that he was not entitled to receive FECA benefits and CSRS/FERS benefits concurrently (except for a schedule award). He, therefore, was advised that he could not receive dual benefits comprised of FECA disability compensation and retirement benefits from OPM.

Whether an individual is at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The circumstances in this case support OWCP’s finding of fault. Appellant had been advised that receipt of retirement benefits and FECA disability compensation for the same period was a prohibited dual benefit. He nonetheless chose to receive both disability retirement benefits and FECA benefits for the period May 1 to 31, 2014 when on June 10, 2014 he accepted a retirement check from OPM which covered the period May 1 to 31, 2014. OWCP properly found appellant at fault in the creation of an overpayment of compensation in the amount of \$3,143.53 as he accepted a prohibited dual payment which he knew or should have known he could not receive.¹⁸ Because appellant was at fault in the creation of the overpayment of compensation, the overpayment was not subject to waiver of recovery.¹⁹

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.433(b).

¹⁷ *See supra* note 15.

¹⁸ *See N.P., supra* note 11.

¹⁹ *See supra* notes 13 and 14.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,143.53. The Board further finds that OWCP properly determined that he was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board